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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STATE OF CALIFORNIA

Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE AMERICAN RIVERS, NATIONAL AUDUBON SOCIETY, FRIENDS OF THE EARTH, SIERRA CLUB, AMERICAN WHITEWATER AFFILIATION, FRIENDS OF THE RIVER, ENVIRONMENTAL POLICY INSTITUTE, TROUT UNLIMITED, SAVE OUR STREAMS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Can the Federal Energy Regulatory Commission in licensing a hydroelectric project preempt State water law regulations designed to protect the fish and wildlife resources in the State's rivers?

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INTEREST OF AMICI CURIAE

Amici Curiae[1] American Rivers, National Audubon Society, Friends of the Earth, Sierra Club, American Whitewater Affiliation, Friends of the River, Environmental Policy Institute, Trout Unlimited, and Save Our Streams are non-profit conservation organizations committed to the preservation and enjoyment of America's natural rivers.[2] These organizations have a cumulative membership of approximately 1,000,000 persons.

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[1]Pursuant to Supreme Court Rule 36.1, the consent of the parties to the filing of this amicus curiae brief is filed herewith.

[2]See Appendix I for description of Amici Curiae.

The decision of the Court of Appeals for the Ninth Circuit is of concern to Amici because it eviscerates State authority to protect river resources from the adverse effects of ill-conceived hydroelectric development. Using their authority to regulate water uses and water flow, California and other states have the ability to minimize the adverse effects of hydroelectric projects on streamflow and fish and wildlife resources. The decision of the court below excludes the States from regulating stream flow at and below hydroelectric projects licensed by the Federal Energy Regulatory Commission (FERC), and deprives the States of their traditional regulatory authority to protect fish and wildlife resources.

Construction of new dams and diversions for hydropower is one of the greatest threats to our nation's remaining free-flowing rivers. Hydroelectric projects can turn free-flowing rivers into slack lagoons, destroying the biological, scenic and recreational values of the nation's remaining undammed rivers. They block salmon and other anadromous fish from reaching their traditional spawning grounds and destroy other natural fisheries by changing stream temperature and chemistry. Hydroelectric projects also frequently degrade water quality and can dramatically destroy natural riverine landscapes.

This case is of special concern to Amici because of the dramatic increase

over the last decade in the pace and extent of development of our nation's rivers for hydropower. Since the FERC (formerly the Federal Power Commission) was established in 1920, approximately 2000 non-federal hydroelectric projects have been constructed under federal license. However, since the early 1980's, the FERC has received over 7000 applications to study or construct specific hydroelectric facilities. Each year since 1980, the FERC has given final regulatory approval to approximately 200 projects nationwide. Regrettably, this increased pace of development, and the associated environmental costs, has produced little energy gain for the nation. The Rock Creek project is a case in point -- it would ostensibly produce 7,000 megawatt-hours of electricity, or

less than five one thousandths of one percent of California's annual electricity consumption.[2]

Amici offer a perspective in this case that is distinct from the position of either the State of California or of the Federal Energy Regulatory Commission. The State of California argues, in effect, that state water rights laws should have primacy over the regulatory decisions of the FERC. The FERC contends that the Federal Power Act completely preempts state regulation of hydroelectric facilities and, therefore, the State lacks authority to set stream bypass flows for FERC-licensed

[2]California Statistical Abstract, California Department of Finance, p. 181 (1987).

hydroelectric projects. Amici present a middle position consistent with the traditional allocation of environmental regulatory authority in our federal system: that the States and the FERC have concurrent jurisdiction over hydroelectric facilities and that operators of hydroelectric facilities should comply with the regulatory requirements of both the FERC and the states. In other words, hydroelectric licensees should comply with the highest of the minimum bypass flows imposed by the state or the FERC.

SUMMARY OF ARGUMENT

Pursuant to Supreme Court Rule 17.1(c), this Court should grant the petition filed by the State of California

in order to resolve the conflict between the decision of the court below and California v. United States, 438 U.S. 645 (1978), and to address this important issue concerning the proper balance between federal and state environmental regulation of hydroelectric projects.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH CALIFORNIA V. UNITED STATES

The decision of the court below, State of California v. FERC, 877 F.2d 743 (9th Cir. 1989), rests squarely on this Court's decision in First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n, 328 U.S. 152 (1946). However, in California v. United States, 438 U.S.

645 (1978), this Court rejected the analytic foundation for its earlier decision in First Iowa. Thus, the decision below is in sharp conflict with this Court's latest holding on the subject of federal preemption of water regulatory laws applicable to federal water development projects. To resolve the conflict in its own decisions, as well to correct the decision of the court below and of other lower federal courts, see, e.g., Town of Springfield v. McCarren, 722 F.2d 728 (2d Cir. 1983), the Court should grant certiorari and reverse.

In First Iowa, this Court overturned a decision by the Federal Power Commission denying a license for a project on the ground that the

developer had not received a use permit under Iowa law. While the decision turned on the proper interpretation of section 9(b) of the Federal Power Act, the Court also commented on section 27 of the Act, which provides that federally licensed hydroelectric projects are subject to state laws relating to the "control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses." 16 U.S.C. § 821. This Court stated that section 27 saves certain state laws "relating to property rights as to the use of water" and that it "has primary, if not exclusive, reference to such proprietary rights." 328 U.S. 175-76. The Ninth Circuit Court of Appeals relied on this statement in the present case in ruling that the State of California

lacked the authority to require higher minimum bypass flows than those provided in the FERC license. 877 F.2d at 749.

In California v. United States, this Court held that section 8 of the Reclamation Act, 43 U.S.C. § 383, generally requires federal agencies to comply with terms and conditions attached to state water permits. Section 8 provides, in language virtually identical to that of section 27, that federal reclamation projects are subject to state laws "relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired therein." 43 U.S.C. § 383. Significantly, in First Iowa the Court expressly noted that section 27 was modeled after the language of section 8

and should be interpreted in the same fashion. 328 U.S. at 176 n. 20.

Not only did this Court in California v. United States reach an entirely different conclusion than the First Iowa Court about the meaning of the statutory language, the Court in California v. United States expressly rejected the proprietary rights theory that provided the basis for the Court's conclusion in First Iowa that section 27 was not intended to preserve state regulatory authority over hydroelectric projects. 438 U.S. at 674-675. Further, this Court specifically disavowed several decisions which expressly relied on the First Iowa decision and the proprietary rights theory. 438 U.S. at 674-675; see Ivanhoe Irrigation District v. McCracken,

357 U.S. 275, 291-92 (1958); City of Fresno v. California, 372 U.S. 627, 629-30 (1963). The rejection of the proprietary rights theory in California v. United States effectively overrules the reasoning of the First Iowa decision.

The Court of Appeals for the Ninth Circuit offered several unconvincing reasons for its refusal to follow this Court's teachings in California v. United States. First, it reasoned that this Court's interpretation of section 8 did not effectively overrule this Court's interpretation in First Iowa of section 27 because the two sections "address two different and entirely separate water use systems." 877 F.2d at 749. This statement is unconvincing, because both the Federal Power Act and the Reclamation

Act deal with water development projects. These projects, whether federally licensed or operated, have the same potential for interfering with the objectives of state water regulatory laws. Thus, there is no difference between the Bureau of Reclamation's water development program and the FERC's licensing program that justifies a different interpretation of the same statutory language applicable to each agency. Indeed, if anything, there is a stronger case for federal preemption of state water laws applicable to Bureau projects built and operated by the federal government, than in the case of non-federal projects subject only to federal licensing by the FERC.

Second, the Court of Appeals for the Ninth Circuit pointed to the "comprehensive hydropower planning authority" vested in the FERC as further support for the conclusion that the Federal Power Act preempts inconsistent state regulation. 877 F.2d at 748. It is correct that Congress has directed the FERC to ensure that its licensing decisions with respect to individual projects are consistent with comprehensive, basin-wide plans designed to achieve an appropriate balance between competing public uses of rivers. See LaFlamme v. FERC, 842 F.2d 1063 (9th Cir. 1988); National Wildlife Federation v. FERC, 801 F. 2d 1505 (9th Cir. 1986). However, it does not follow from this grant of comprehensive planning responsibility that Congress intended to

vest exclusive regulatory authority over hydroelectric projects in the FERC alone.

In 1920, when Congress first established the Federal Power Commission, predecessor to the FERC, it affirmatively recognized, not only in section 27, but in other provisions that the Commission would share regulatory authority over hydroelectric development with other governmental agencies. Section 4(e) of the Federal Power Act provides that the FERC may issue a license on certain federal lands only after it determines that the project "will not interfere or be inconsistent with the purpose for which such [federal] reservation was created or acquired;" however, the provision goes on to state that "the license shall be subject to and contain

such conditions as the Secretary of the department under whose supervision such reservation falls [i.e., Interior or Agriculture] shall deem necessary for adequate protection and utilization of such reservation." 16 U.S.C. § 797(e).

In Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984), this Court ruled that section 4(e) requires the FERC to accept without modification conditions prescribed by the Secretaries of Interior or Agriculture for hydroelectric development. This Court rejected the argument that the FERC's comprehensive planning responsibilities were inconsistent with the conclusion that section 4(e) granted the Secretaries mandatory conditioning authority. 466

U.S. 778 n.21. Following this reasoning, the Court in this case should reject the conclusion of the court below that the FERC's comprehensive planning responsibilities preclude the application of mandatory state water law requirements to hydroelectric projects.

A variety of other federal and state resource agencies also play important roles in regulating hydroelectric development, further contradicting the argument that exclusive regulatory control must be vested in the FERC. For example, under section 404 of the Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1344(a), the U.S. Army Corps of Engineers is authorized to issue permits for the discharge of dredged or fill material to

navigable waters at a specific disposal site. Because the construction of a dam or hydroelectric facility typically involves the use of dredged or fill material, the Corps of Engineers generally has concurrent jurisdiction with the FERC over hydroelectric projects. See Monongahela v. Marsh, 809 F.2d 41 (D.C. Cir. 1987) (rejecting contention that the FERC has exclusive jurisdiction over hydroelectric development).

Similarly, under section 401 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1341, a FERC licensee is required to obtain water quality certification from state officials before constructing a hydroelectric project. In Roosevelt

Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041 (1st Cir. 1982), the court affirmed the breadth of state control over projects requiring federal licensing and emphasized that a state certification can include such limitations as are necessary to assure compliance "with any appropriate requirement of state law." Id. at 1056. Under Roosevelt Campobello, if a state legislature or state agency prohibits or sets conditions on a proposed hydroelectric project, and if the state's water quality agency includes those requirements in its section 401 water quality certification, those conditions are binding on the FERC and must become part of the FERC license.

Another example of Congress' intent to share the planning

responsibilities for hydroelectric projects with agencies other than the FERC is the 1986 amendment of Section 10(a) of the Federal Power Act requiring the FERC to consider "[t]he extent to which the project is consistent with a comprehensive plan ... for improving, developing or conserving a waterway or waterways affected by the project that is prepared by -- (i) an agency established pursuant to Federal law that has authority to prepare such a plan; or (ii) the State in which the facility is or will be located." 16 U.S.C § 803(a)(2)(A). Thus, Congress specifically provided for separate federal agency and state planning for waterways, to complement the FERC's own comprehensive planning activities.

II.

THIS CASE PRESENTS AN IMPORTANT QUESTION CONCERNING THE PROPER ALLOCATION OF ENVIRONMENTAL REGULATORY AUTHORITY BETWEEN THE STATES AND THE FEDERAL GOVERNMENT

This Court should also grant certiorari because this case presents a substantial controversy of major interest to hydroelectric developers, state officials, and conservation interests. The public interest will be served if this Court grants the petition and definitively resolves the extent to which the Federal Power Act preempts state water regulatory laws applicable to hydroelectric projects.

Amici support a clear, definite role for state water regulatory officials because these officials have substantial knowledge about and expertise in managing the specific resources affected by hydroelectric development. State officials are very knowledgeable about the rivers and streams that offer important fishing opportunities, wildlife habitat or are used for recreational pursuits such as whitewater kayaking and canoeing. They manage these rivers and streams on a day-to-day, year-to-year basis, balancing the need for municipal and agricultural water against the flows required to support the natural ecology in and along these rivers and streams. Moreover, state water resource managers have detailed knowledge about other water resource demands, and must manage entire

rivers systems as economic and ecological units.

Amici believe that the most appropriate resolution of the conflicting demands of the States and the FERC is to recognize that each has concurrent jurisdiction over minimum by-pass flows for hydroelectric licenses. While section 27 clearly preserves state authority to apply state water laws to hydroelectric projects, this provision cannot reasonably be read to grant such extensive authority to the states that they would be permitted to contradict the FERC's licensing jurisdiction. Section 27 is properly reconciled with the rest of the Federal Power Act if hydroelectric developers are required to comply with the requirements set under state water

laws and with the requirements imposed by the FERC under the Federal Power Act.

There is no necessary conflict between state and federal requirements for by-pass flows. In this particular case, for example, the FERC required a minimum by-pass flow of 11 and 15 cubic feet per second depending on the season, and the California Water Resources Control Board required a minimum by-pass flow of 30 and 60 cubic feet per second. While the minimum flow required by the Board is higher than the minimum flow required by the FERC, there is no evidence that the licensee cannot comply with both requirements at the same time.

Nothing in the language of section 27 suggests that this provision was

intended to provide the states exclusive jurisdiction to establish water flows at hydroelectric projects. Section 27 states that the Federal Power Act should not be construed "as affecting or intending to affect or in any way to interfere" with state water laws. 16 U.S.C. § 821. The Federal Power Act does not affect or interfere with state water law so long as it is understood that a FERC licensee is subject to concurrent state jurisdiction, and the licensee must comply with the requirements of the FERC and the state.

At the same time, there is no indication in the Federal Power Act that the preservation of state water regulatory authority in section 27 was intended to permit the states to

unreasonably interfere with the FERC's licensing decisions. This is precisely the type of conflict that would occur, however, if the states had exclusive regulatory authority over water flow and if state conditions imposed pursuant to that authority superseded FERC license conditions. There is nothing in the language or legislative history of section 27 to suggest that Congress intended for the states, relying on the authority reserved to them under section 27, to be able to require a licensee to violate the terms of the FERC license. It is worth underscoring that section 27 reserved state authority to regulate only certain aspects of a hydroelectric project; the provision does not subtract from the FERC's authority, granted by

other provisions of the Act, to license and regulate the project.[3]

The conclusion that the Federal Power Act grants the FERC and the states concurrent jurisdiction is supported by common sense. It is literally impossible for the FERC to confine its jurisdiction to the construction and operation of hydroelectric facilities, on the one hand, and for the states to regulate the appropriation and use of water, on the

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[3]Moreover, contrary to the conclusion of court below, 877 F.2d at 749, there is no basis for the assertion that changing the flow rates would constitute a veto of the project. This Court rejected a similar argument in the hydroelectric licensing context in Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 776-780 (1984) (Secretary of Interior's power to require that conditions be included in hydroelectric license not a veto power of the project).

other. Decisions about the appropriate direction and quantity of water flow at a hydroelectric project go to the very heart of the hydroelectric licensing process. As a result, if the states had exclusive authority over water rights issues associated with hydroelectric projects, the states would in effect have exclusive authority over the construction and operation of hydroelectric facilities. Thus, the practical overlap between water regulation and hydroelectric licensing requires some overlap in the authority exercised by the FERC and by the states. In sum, the best construction of section 27, read in the context of the Federal Power Act as a whole, is that a FERC licensee should be required to comply with all the terms and conditions of its FERC license as well

as the requirements of state water regulations.

Finally, concurrent federal and state jurisdiction over hydroelectric development is consistent with this Court's recent decision in California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987), concerning the appropriate regulatory balance between state and federal control over natural resources. In Granite Rock, this Court approved the state and the federal government's shared regulatory authority over natural resources by upholding a permit requirement imposed by the California Coastal Commission on a mining developer operating on federal land. Although the project was located on lands administered by the U.S. Forest Service,

this Court required the mining developer to obtain an additional permit from the state agency. The decision of the court below in this case directly conflicts with Granite Rock's teaching that federal agencies must accommodate state environmental regulatory authority. Moreover, under Granite Rock, the FERC's assertion of exclusive jurisdiction amounts to an argument that there is no possible set of conditions that the California State Water Resources Control Board could place on the hydroelectric license that would not conflict with federal law, i.e., a facial challenge to the State Water Board's minimum flow requirement. Granite Rock soundly rejected this approach.

CONCLUSION

For the foregoing reasons, Amici respectfully urge the Court to grant the petition for certiorari of the State of California.

DATED: September 22, 1989

Respectfully submitted,

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APPENDIX I.

DESCRIPTION OF AMICI CURIAE

American Rivers is a non-profit organization with offices located at 801 Pennsylvania Avenue, S.E., Washington, D.C. The mission of American Rivers is to preserve America's outstanding rivers and their landscapes. With approximately 12,000 members across the country, American Rivers is the nation's principal river conservation organization.

National Audubon Society is one of the oldest, largest, and most experienced national conservation organizations. It has approximately 500,000 members, including approximately 65,000 members in the State of California, who are dedicated to the

conservation and wise use of natural resources and protection of the environment. National Audubon Society is incorporated under the laws of the State of New York and has its corporate headquarters at 950 Third Avenue, New York, New York 10022. High among National Audubon Society's purposes is the conservation of the nation's waters and the protection of riparian and aquatic habitat.

Friends of the Earth is a national and international conservation organization, incorporated in the State of New York, with approximately 15,000 members residing in the fifty United States and affiliate conservation organizations in thirty-one different countries around the world. Friends of

the Earth has a long history of seeking to preserve special free-flowing rivers and streams and promoting ecologically sound hydroelectric development. Its members use and enjoy many of the rivers and streams that are threatened by hydroelectric development.

The Sierra Club is a non-profit corporation organized in 1892 under the laws of the State of California, with its principal place of business in San Francisco, California and other offices located throughout the nation. The Sierra Club is a national conservation organization with approximately 420,000 members dedicated to protecting natural resources, including outstanding riverine resources. Approximately 160,000 of the

Club's members reside in the State of California.

American Whitewater Affiliation was established in 1961 to protect and enhance the recreational enjoyment of whitewater sports in America. The primary focus of the Affiliation's activities has been the preservation, protection and enjoyment of whitewater rivers in America and throughout the world. The Affiliation is a Missouri not-for-profit corporation with approximately 1300 individual or business members and 61 affiliate members.

Friends of the River is a California non-profit organization with 9,000 members. Its mission is to preserve streams and rivers in their

natural state in the western United States. Most of its members use rivers and streams for fishing, boating, walking, aesthetic appreciation and other forms of recreation. Friends of the River is frequently involved in proceedings before the Federal Energy Regulatory Commission and the State of California Water Resources Control Board.

Environmental Policy Institute is a national conservation organization dedicated to the protection of the environment and the conservation of natural resources. It is vitally interested in assuring the maximum protection for America's most outstanding rivers. Environmental Policy Institute has a longstanding interest in promoting sound water development policy, and has

assisted state as well as local organizations in river protection efforts.

Trout Unlimited is a non-profit 501(c)(3) coldwater conservation organization whose offices are located at 501 Church Street, N.E., Vienna, Virginia, 22180. Trout Unlimited's purpose is to protect, enhance and preserve the coldwater fisheries of North America. Its 64,000 members, including some four hundred local chapters, assist local, state and federal agencies in fisheries management. A key to maintaining coldwater fisheries' biological integrity is the quantity and quality of the water. Thus, Trout Unlimited works to assure stream flows that support strong salmon populations.

Save Our Streams (SOS) is a grassroots volunteer organization devoted to preservation of free-flowing streams on federal lands in California. SOS has 750 members who use California streams for hiking, swimming, fishing, and spiritual renewal.